IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

No. 10386.

PACIFIC POWER & LIGHT COMPANY and AMERICAN POWER & LIGHT COMPANY,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

REPLY BRIEF FOR PETITIONERS.

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TABLE OF CONTENTS.

Index.

Table of Cases Cited.

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Introductory Statement.

The grounds on which the Commission attempts, without discussing the question whether it controls the fundamental books of account of Pacific, to rebut the contentions made by the Petitioners in their main brief may be summarized as follows:

(1) That with respect to the item of $4,121,981.41 classified by the Commission in Account 107, the Commission's authority to dispose of such item as distinguished from the mere method of disposition is not properly in issue (Res. Br. 16);

(2) That if the entire question of disposition is in issue, (a) it is disposed of by the decisions of this Court in *Northwestern Electric Company* v. *Federal Power Commission,* 125 Fed. (2nd) 882 and *Northwestern Electric Company* v. *Federal Power Commission,* 134 Fed. (2nd)

740 (Res. Br. 16-19) and (b) is supported by the evidence in this case (Res. Br. 13-16);

(3) That the Commission's amortization of the $2,741,-591.66 classified in Account 100.5 is supported by substantial evidence (Res. Br. 19-30), and the Commission's authority to prescribe the amortization of that item is fully sustained by *American Telephone & Telegraph Company* v. *United States,* 299 U. S. 232 (Res. Br. 30-31);

(4) That Petitioners' objection to the amortization of the $2,741,591.66 through Account 537 instead of Account 505 has been waived for failure specifically to include it in Petitioners' applications for rehearing or in Petitioners' application for review (Res. Br. 31); that the evidence offered by the Petitioners to show that the intangible value represented by the $2,741,591.66 has not disappeared was incompetent for that purpose; that the record shows that the properties to which this intangible value related have disappeared (Res. Br. 33-35); and that *Northwestern Electric Company* v. *Federal Power Commission,* 134 Fed. (2d) 740, disposes of Petitioners' contentions that the Commission cannot require the amortization of the $2,741,591.66 because (a) such a requirement is an adjudication that the common stock of the Company is not legally paid up and therefore an assumption of the judicial powers rightfully lodged in the courts of the state of incorporation, and because (b) such a disposition of the $2,741,591.66 is a deprivation of Petitioners' property without due process of law in that the order purports to divert to amortization of intangibles earnings or surplus which would otherwise be available for the payment of dividends (Res. Br. 35-37).

POINT I.

The entire question of disposition of the $4,121,981.41, not merely the method of disposition, is in issue here.

On page 16 of its brief, Respondent states:

> "Moreover, since all amounts transferred to Account 107 become subject to disposition 'as the Commission may approve or direct', the Commission's authority to dispose of the 'write-up', as distinguished from the method of such disposition, is not properly in issue. *American Tel. & Tel. Co.* v. *United States,* 299 U. S. 232, 240."

The contention thus made that Petitioners have acquiesced in the classification of $4,121,981.41 in Account 107 and that Account 107 by its terms gives the Commission authority to require a write-off obviously is without merit unless related only to memorandum accounts kept solely for the information of the Commission. In the first place, the system of accounts in itself confers no authority on the Commission, which must find its power in the statute. Furthermore, the *American Telephone & Telegraph* case not only does not support the Respondent's position in this respect but, on the contrary, squarely holds that an account such as Account 107 cannot constitutionally be construed to require a mandatory or arbitrary write-off of amounts classified therein.

Account 107 purports to represent the difference between book value and cost to the accounting utility. In the *American Telephone & Telegraph Company* case, the Court held that, although such increments may be segregated by classification in separate accounts such as Account 107, no write-off can be justified where the increment represents

"a true increment of value." Therefore, it is clearly established that classification of an amount in Account 107 and acceptance of such classification by the Petitioners here does not automatically determine that this amount may be ordered written off by the Commission. On the contrary, the *American Telephone & Telegraph Company* case indicates that the write-off of such an amount is proper only if the evidence establishes that the increment segregated is a fictitious or a paper increment and does not represent "the difference between present value and original cost." Moreover, any consideration of a method for writing off book values fully supported by existing asset values inherently raises the whole question of disposition and the taking of property without due process.

POINT II.

The issues in this case with respect to the disposition of the $4,121,981.41 have not been finally determined by the decisions of this court in the *Northwestern* case.

On pages 16 through 19 of its brief, Respondent makes the contention that the authority of the Commission to require the disposition of the $4,121,981.41 which it has ordered is settled by the decisions of this Court in the *Northwestern Electric Company* case.

The question of disposition of amounts reclassified in Account 107 of the Commission's system of accounts was not settled by this Court in the *Northwestern* case. Upon the first Northwestern review the Commission, in brief and oral argument, contended that:

> "Inasmuch as the Commission has granted a rehearing and has not passed upon the questions raised therein, the administrative process has not been com-

pleted. The question of the disposition of $3,500,000, therefore, is not properly before the Court."

And it was successful in its endeavor to avoid judicial consideration of the *disposition* question. In its opinion this Court said: "With respect to the common stock item a rehearing of the Commission's order was granted but not decided. Until decided there is no order to review here." On the second review in the *Northwestern* case, this Court declined to consider whether the Commission was authorized to order a write-off of book values in excess of original cost but supported by existing values, upon the ground that the Court had approved the system of accounts prescribed, and held that questions of value were not pertinent to the issues of *reclassification*. *Stare decisis* is inapplicable here; no proposition of law can be said to have been established when it appears that it was not in the mind of the Court when the decision was made. *Woodruff* v. *Parham,* 8 Wall. (U. S.) 123.

Because the Commission's contentions in this case are similar to the contentions made by it in opposing the granting of certiorari in the *Northwestern* case, we have included our reply brief before the Supreme Court in that case as Appendix A hereto. (Certiorari was granted in the *Northwestern* case on October 10, 1943.)

Furthermore, the situation here is distinctly different from that which was present in the *Northwestern* decisions. In the *Northwestern* case the interests of American Power & Light Company were ignored and the application of "company cost" was insisted upon because it resulted in a lower book value, but in this case, where the use of cost to American Power & Light Company results in a lower book value, "company cost" is ignored and the corporate entity of the accounting company is disregarded. The Commission claims

that the *Northwestern* decisions are decisive. If so, it must apply the *Northwestern* case principles applicable to the determination of "company cost" which would require substantial proof that the company received no value for its stock. It may not substitute for substantial proof of "company cost" the supposition that there has been unfair dealing between affiliates requiring the application of system cost. There is no proof in this case which makes the *Northwestern* case applicable; the corporate set-up and the nature of the transactions are entirely dissimilar.

In the present case, it is unquestioned that properties were transferred to Pacific in exchange for the stock and securities issued. The decision of the Commission in ordering that $4,121,981.41 of the recorded cost of these properties to Pacific be regarded as a write-up for the purpose of the system of accounts is based solely on the refusal of the Commission to recognize an inter-company transaction as establishing the cost of properties. The Commission did not even go into the question of what the value of the properties was or whether their cost was established in good faith by the respective Boards of Directors of Pacific Power & Light Company and American Power & Light Company. It did not determine whether a valid sale had been consummated between separate corporate entities, or consider either cost or value as determinable at the time. In fact, it excluded all consideration of state laws, although the transactions which it would recast took place long prior to enactment of the statute from which it derives a limited authority. It merely took the position that the "system cost" to American Power & Light Company, when it purchased the properties from outside of the affiliation, determined the cost for any member of the affiliated group for the purpose of its system of accounts (R. 428).

Even if it be accepted for the sake of argument that fundamentally the same issues are present here as were present in the *Northwestern* case, the ruling of the *Northwestern* case cannot yet be accepted as the settled law, since a petition for certiorari in that case has been granted by the Supreme Court. It is, therefore, submitted that the arguments of the Petitioners set forth in their main brief with respect to the disposition of the $4,121,981.41 should be considered on the merits by this Court and that this Court should reconsider the propriety of its decision in the *Northwestern* case in view of the inequity of broadly applying the rules there enunciated by this Court to situations such as that here involved.

Further, in its first decision in the *Northwestern* case this Court said:

> "The system of accounts takes nothing from petitioner. Petitioner may keep such other accounts as it desires. The present regulation only requires a particular system of accounts to be kept, not that other systems shall not be kept."

In Petitioners' application for rehearing, on the second review in the *Northwestern* case, it was pointed out that the disposition then under consideration could not be given effect and the order directing it became meaningless unless taken as controlling the public utility's fundamental and general corporate books of account. This issue must be met and decided in this case, and if the Court considers that the provisions of the Commission's system of accounts require a write-off of the amount thus established in Account 107, it must be held that this requirement is limited to the Commission's system of accounts and does not affect the fundamental books of account of Pacific.

POINT III.

The Commission's order for the amortization of the $2,741,591.66 classified in Account 100.5 is not fully supported by substantial evidence and is invalid under the *American Telephone & Telegraph Company* case.

The Respondent's arguments that its order requiring the disposition of the $2,741,591.66 is fully supported by substantial evidence are peculiarly unconvincing.

In the first place, the Commission asserts that the record shows both Petitioners' and Respondent's witnesses agreeing that the $2,741,591.66 was paid for intangibles, and that these intangibles are rooted in and based upon the purchaser's evaluation of the prospective earning power of the situation. On the contrary, the Commission has referred to no part of the record which contains such an admission upon the part of Pacific's witnesses. It is true that the Commission's staff attempted to put such an admission into the mouth of Petitioners' witness Will T. Neill by asking the question "And they all tie in, do they not, with an evaluation the prospective purchaser makes of the prospective earning power of the situation?" (R. 393). Mr. Neill's answer was "I think they are all found in the situation. In any acquisition there are potential values coming about by tieing a property in with others to get greater efficiency in the use of the whole system and a better chance for development or rapid growth" (R. 393). It should be noted that Mr. Neill's statement was that the intangibles were found "*in the situation,*" not in the "*prospective earning power* of the situation." This statement is not an expression of agreement that intangibles are rooted in and based upon the purchaser's evaluation of the

prospective earning power of the situation, but on the contrary supports the Petitioners' contention on pages 21, 22, 26 of their main brief that these intangible values are related to the physical projects, the physical characteristics of the area covered and the integration of utility properties into efficient systems. The proposition that all intangible values are simply estimates of prospective earnings is merely the theory of the Commission's staff to which its members testified when called upon as witnesses.

The Commission's case rests entirely upon the opinions of its own staff members. To label such opinions as substantial evidence does violence to due process, especially when the opinions are rendered by accountants who could not and did not qualify as experts capable of rendering a judgment as to the propriety or necessity of amortizing the properties and business with which the so-called intangibles are so inextricably associated. In so far as regulation is concerned, this is a problem for skilled technicians and engineers and so far as business considerations are involved, it requires the judgment of men skilled in the operation of such a system under comparable circumstances. The Commission's witnesses qualify on neither basis.

Aside from the Commission staff's own opinion as to the nature of the intangibles and the propriety of disposing of them in the manner in which the Commission has directed, the Commission has failed to point to any substantial evidence in support of its order. The most it can say with respect to the practice of the Bureau of Internal Revenue in accounting for intangibles for income tax purposes is that it is not bound by the accounting principles followed by the Bureau. It has practically conceded that a write-off of intangibles is not required by accounting prin-

ciples, although not prohibited if there are other good reasons to support it (Res. Br. 27).

The Commission attempts to substitute for the lack of evidence in the record the practice of the Interstate Commerce Commission of approving purchases of property, where the excess of purchase cost over cost to the seller represents a payment for intangibles, only upon the condition that the amount of intangibles be amortized or written off at once (Res. Br. 28). These cases do not supply the deficiency in the record for three reasons:

1. Under the rule laid down in the *American Telephone & Telegraph Company* case the propriety of a write-off must be determined upon the evidentiary circumstances in the particular case.

2. In the Commission decisions cited, the Interstate Commerce Commission was not imposing an amortization requirement retroactively. A condition of that Commission's permission to the carrier to acquire the property was that the amounts paid for intangibles be amortized. Knowing this in advance, the carrier could go through with the purchase or reject it. On the other hand, Pacific paid for its properties, tangible and intangible, many years ago and subject to no such conditions. To require Pacific now to write-off such amounts as may be deemed to have been paid for intangibles without any evidence that such intangibles have disappeared is a deprivation of the property rights of Pacific and its stockholders.

3. The Commission cites no court decision sustaining the authority of the Interstate Commerce Commission (a regulatory body which has much more comprehensive jurisdiction over carriers than the Federal Power Commis-

sion has over utilities), or of any other regulatory body, to impose any such amortization conditions upon its approval of a property purchase. A similar condition which the Public Service Commission of the State of New York sought to impose was declared unconstitutional by the Court of Appeals of the State of New York in *People ex rel. Iroquois Gas Corp.* v. *Public Service Commission,* 264 N. Y. 17. And in *Atlanta, B. & C. R. Co.* v. *U. S.,* 296 U. S. 33, which seems to be the only case involving the power of the Interstate Commerce Commission to apply its accounting precepts to the purchase of a railway property, book value was determined by the court only after *consideration of the fair value* of the property.

POINT IV.

Respondent's arguments do not dispose of Petitioners' objections to the Commission's amortization of intangibles.

The Respondent, having failed in its attempt to show that its amortization order is supported by substantial evidence, attempts to dispose in rather perfunctory fashion of several of the valid objections made to its order in Petitioners' main brief.

Respondent first contends that Petitioners cannot complain that the order requires amortization of the $2,741,591.66 through Account 537 rather than Account 505 because this objection was not in Petitioners' application for rehearing or in the petition for review. In answer to this, it is sufficient to mention that both the applications for rehearing (R. 68-69, 76-77) and the petition for review (R. 102-105) objected generally to the amortization order as an

unlawful taking of property without due process of law. Since the whole includes all of its parts, this objection clearly covers Petitioners' contention that the particular feature of the order which requires the write-off to be made through Account 537 is an unlawful deprivation of Petitioners' rights and justifies the pointing out of this particular feature as one of the many reasons why the order as a whole is invalid.

In so far as Respondent contends that amortization through Account 537 rather than Account 505 does not involve any deprivation or confiscation of property on the ground that this is not a rate case and the final amount of income available for surplus is not affected (R. 32), it ignores the obvious fact that by making a distinction between Accounts 505 and 537 in its system of accounts and by ordering the amortization of the $2,741,591.66 here involved through Account 537, it is prejudging the rate case issues without going into all of the factors necessary to a rate case decision. In all events, since the amount involved represents a legitimate investment, it clearly is confiscatory to require the investor to bear the cost of its assumed disappearance in service instead of requiring that it be charged to the customers in whose behalf the investment is being used up.

Respondent further contends that Petitioners cannot complain of the Commission's exclusion of evidence of the fair value of Pacific's property as of December 31, 1940, relying mainly on the decisions of this Court in the *Northwestern Electric Company* case. This argument is erroneous on two grounds:

First, as Petitioners have demonstrated, the only evidence in the record on which the Commission's amortization order can ultimately be based is the opinion testimony

of its own staff that intangible values tend to disappear and may have disappeared. Any weight to which this opinion testimony might be entitled is thoroughly dissipated by the Commission's refusal to permit the introduction of evidence which would show that the fair value of Pacific's property is sufficient to include the full book value of the intangibles.

Second, the opinion of the United States Supreme Court in the *American Telephone & Telegraph Company* case clearly states that amounts of company cost in excess of original cost may properly be segregated under a system of accounts, but that such amounts may not be written off if they represent "a true increment of value", clearly indicating that evidence of present fair value is not only admissible, but a controlling factor in a case such as is here present.

As has already been pointed out, the factual situation in the *Northwestern Electric Company* case was far different from that here involved with respect to the items classified in Account 107 and the *Northwestern* case did not deal at all with the disposition of amounts classified in Account 100.5. Even if this Court is sustained in holding in the *Northwestern* case that present fair value had no bearing on the proper disposition of amounts classified in Account 107 and even if the factual situation in that case with respect to amounts classified in Account 107 were not different from that involved here, the *Northwestern* case would form no precedent applicable to the disposition of items in Account 100.5. Thus, even if this Court's decision in the *Northwestern* case is upheld as proper, in the proceedings now pending before the United States Supreme Court, with respect to the disposition of items in Account 107, the fact still remains that items in Account 100.5 represent *bona fide* actual cost to a utility system on purchases

from outside the affiliation which may be segregated for scrutiny but cannot be disposed of without substantial evidence that they are unsupported by existing asset values.

Respondent, apparently realizing that the *Northwestern* case is not controlling with respect to the disposition of items classified in Account 100.5, makes a further contention that the fair value of the properties, tangible and intangible, as of December 31, 1940, is not competent or material to show that intangibles purchased twenty to thirty-three years ago cannot disappear or have not disappeared. On the contrary, it is submitted that there is no more practical way of showing that these intangibles have not disappeared than by showing that they, and Pacific's properties as a whole, have a value today in excess of their book value.

Respondent attempts to bolster the opinion testimony of its own staff by quoting Petitioners' statements that the intangibles have become fused with the system and situation of which they have become inseparable parts (Res. Br. 34) and that the $2,741,591.66 should be retained in Account 100.5 until the "complete retirement or disposition of the respective systems to which the components of this total respectively apply; and at such time or times to remove from Account 100.5 so much thereof as pertains to the system acquisitions then retired or disposed of" (Res. Br. 21-25) and by further contending that the record shows that the original properties purchased are virtually no longer in existence (Res. Br. 19, 35).

In the first place, it should be noted that the Petitioners proposed to write-off the amounts classified in Account 100.5 when the respective *systems* to which they relate are abandoned or retired, whereas the Respondent attempts to twist this statement to mean that the intangibles should be written off as parts of the *particular plants and transmission lines composing that system* are retired and replaced.

Secondly, the values realized in the acquisition and integration of the acquired properties cannot be related or segregated to individual items such as poles, meters, generators, etc. A business enterprise does not consist merely of an aggregation of physical (or statistical) items. Its values are inherent in the efficiency, economy, location and service value of the system and its operations. Since this is the yardstick which must always be applied in valuing a business enterprise, the addition to and improvement of its physical properties, instead of terminating the life of the intangibles, would have the effect of enhancing such values inherent in the enterprise and extending their life.

Finally, the Respondent regards the remaining contentions of the Petitioners based on the Commission's unwarranted assumption of judicial powers and its confiscation of Petitioners' property rights through the diversion of earnings or surplus otherwise available for dividends as adjudicated by this Court in the *Northwestern* case (Res. Br. 35-37). These objections, Petitioners reassert, are vitally pertinent to the disposition herein ordered of both the $4,121,981.41 classified in Account 107 and the $2,741,591.66 classified in Account 100.5. We respectfully submit that they should be carefully considered by this Court, first, because the conclusions reached by this Court in the *Northwestern* case are not final, since certiorari has been granted by the Supreme Court in that case and, secondly, because even if such conclusions become final in the *Northwestern* case, this case is clearly distinguishable from the *Northwestern* case (1) in that the $4,121,981.41 classified in Account 107 clearly represents company cost, although not the system cost, of assets actually received by the accounting utility, whereas in the *Northwestern* case the $3,500,000 classified in Account 107 was found to be an amount written on the books for which no tangible asset was ever received,

and (2) in that this case deals with an amount of admitted legitimate cost classified in Account 100.5, whereas no such issue was involved in the *Northwestern* case.

Conclusion.

It is, therefore, submitted that the order of the Commission dated November 24, 1942 in so far as it directs the amortization or write-off of amounts classified in Account 100.5, Electric Plant Acquisition Adjustments, or Account 107, Electric Plant Adjustments, should be declared invalid and set aside, and that Section 301 (a) of the Federal Power Act, if deemed to authorize such order, should be declared unconstitutional and void, for the reasons cited in Petitioners' main brief.

Respectfully submitted,

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Appendix A.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 195

NORTHWESTERN ELECTRIC COMPANY
and
AMERICAN POWER & LIGHT COMPANY,
Petitioners,
v.
FEDERAL POWER COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR PETITIONERS.

Introductory Statement.

First of all, this is not a mere accounting case. The issues raised in our petition for certiorari, but ignored in the Commission's brief, deal primarily with considerations which are outside the accounting function. Indeed, the decision of the court below so gravely misconstrued Section 301(a) of the Federal Power Act as to hold, in effect, that the Federal Power Commission, by reason of authority as

to accounting alone, may exercise plenary power over the affairs of a locally regulated utility company, ousting the State courts of jurisdiction and nullifying their judgments. The ambit of the Commission's statutory authority has been grossly exceeded and the Commission's order "as applied to the facts before it and viewed in its entirety" produces a shockingly "arbitrary result". *Federal Power Commission* v. *Natural Gas Pipe Line Co.*, 315 U. S. 575, 586.

Argument.

I.

The Commission's brief asserts that we attempt to argue all the questions which would be open if the Commission's original order were before this Court and relies primarily upon the plea of *res judicata.* The Commission cannot enter such a plea in this proceeding. Interpreting *its own order* before the lower court, it framed the issues to exclude the question of disposition from the scope of the lower court's first judgment; it presented and relied upon the claim that "the question of the disposition of $3,500,000, therefore, is not properly before the court," and it is estopped from asserting that the judgment of the lower court on the first review determined that said amount of $3,500,000 must be written out of the accounts of petitioner, Northwestern Electric Company.

The order which called the original hearing before the Commission only directed Northwestern to show cause why the Commission "should not find and determine by order that adjusting entries be made to bring the books of account in conformity with" a report prepared by the Commission's staff (R. 3). And that report had actually recommended that the amount of $3,500,000 here in question "be

retained in Account 107, Electric Plant Adjustments, pending the submission to the Commission of a plan for its disposition'' (R., Vol. III, Ex. 3, p. 29).

Northwestern's application to the Commission for rehearing (R., Vol. I, pp. 91-100) specifically urged that the question of disposition was outside of the scope of the Commission's order to show cause and the issues of the hearing and that the ordered disposition was without due process of law. The Commission's order on application for rehearing, dated January 21, 1941, directed that ''a rehearing be held * * * for the purpose only of permitting the presentation of a plan of disposition of the amount of $3,500,000 * * *.'' Northwestern filed with and served upon the Commission an application asserting that it was ''unable to determine from the provisions of said order of January 21, 1941, whether the Commission intended thereby to provide or did provide that the issues of such rehearing include all questions appropriately related to the retention in or disposition from said Account 107 of the amount of $3,500,000 and the manner and character of any disposition which may or should be ordered.'' (R., Vol. I, p. 122). The petition for review of the original order of the Commission, in assignments of error IX-10, 11, 12, X and XI, fully pleaded the invalidity of the action of the Commission in ordering disposition of said amount of $3,500,000 and vigorously contended that this portion of the order must be set aside (R., Vol. I, pp. 115, 128-131).

In brief and oral argument the Commission contended that the issue of disposition was not before the court. And it was successful in its endeavor to avoid judicial consideration of the disposition question. In its opinion (R. 819), the lower court said: ''With respect to the common-stock item a rehearing of the Commission's order was granted

but not decided. Until decided there is no order to review here. [1]*Fed. Power Comm'n* v. *Edison Co.*, 304 U. S. 375, 383." Thus, *by the lower court's own decision,* upon the first review, it was established as the law of the case that no phase of the question of disposition was then before that court.

The position now taken by the Commission is in direct conflict with its contentions, both in its brief and on oral argument, which led the lower court to hold that the question of disposition was not then (upon the first review) before that court. Among other things, the Commission's brief (pp. 44-49) then urged:

> "On January 9, 1941, Petitioner filed an application for rehearing on the Commission's order of December 6, 1940 (R. 79). On January 21, 1941, the Commission ordered that a rehearing be held on February 10, 1941, 'for the purpose only of permitting the presentation of a plan of disposition of the amount of $3,500,000 write-up which the Commission, in paragraph (2a) of its order of December 6, 1940, ordered Northwestern to make disposition of, * * *' (R. 113). On December 30, 1940, the Commission stayed that portion of its order which required the disposition of this amount 'pending an application for rehearing herein * * * and the decision of the Commission upon such application for rehearing' (R. 112). A rehearing was held on March 3 and 4, 1941, and an oral argument was had before the Commission sitting *en banc* on May 21, 1941. No order has yet been entered by the Commission as a result of the rehearing and its own stay of its order requiring disposition is still in effect.

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[1] This was the case chiefly relied upon by the Commission in this connection; see p. 5, *infra.*

"Inasmuch as the Commission has granted a rehearing and has not passed upon the questions raised therein, the administrative process has not been completed. The question of the disposition of $3,500,000, therefore, is not properly before the Court.

"The decision of the Supreme Court in *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 381-383, is controlling here. * * *

"It follows that the same reason which prevents the running of the time for taking the appeal, prevents this court from acquiring jurisdiction; i. e., *because jurisdiction continues in the Commission to modify, reverse, or affirm its decision.* Upon the filing of its appeal in this court—its petition for rehearing being then undisposed of—appellant occupied the anomalous position of asking the Commission for administrative relief, and at the same time asking the court for judicial relief from the anticipated decision of the Commission. * * *

"Finally, even if this court did have jurisdiction over the appeal, a situation would be presented calling for the exercise of judicial discretion to determine whether relief should be denied at this stage of the proceedings, until all possible administrative remedies had been exhausted; and in our opinion the appeal should be dismissed for that reason in any event. We have heretofore suggested that rehearings should be availed of by aggrieved persons both for their own protection, and in order to afford opportunity to the Commission to correct errors or to hear newly discovered evidence before appeal. This is not and should not be an arbitrary requirement. Whether a petition for rehearing should be filed in a particular case must be decided on the merits as each case arises. However, in our view, its use as an administrative remedy should not be discouraged, but instead should be encouraged—'not to supplant, but to supplement' appellate re-

> view. * * * *Until the Commission has considered and acted upon such a petition, the administrative remedy of the aggrieved person cannot properly be said to have been exhausted, and resort to this court in such cases is, therefore, premature''* (emphasis supplied).

In the case of *American Tel. & Tel. Co.* v. *U. S.*, 299 U. S. 232, this Court held that the Communications Commission's interpretations of its accounting regulations and orders were binding upon it and could be relied upon by the public. On the basis of such an interpretation, this Court sustained the propriety of placing certain amounts in an account similar to Account 107, although it indicated that such reclassification of the amounts involved would have been unconstitutional if the regulations of the Communications Commission had been interpreted to require automatic disposition. Certainly the public, affected by the regulations and orders of the Federal Power Commission, is entitled to rely upon its interpretation of its own orders, and whether the lower court on the second review intended to reverse the position which it took on the first review or lost sight of its original holding, petitioners have been denied their right to judicial review, as argued beginning at page 31 of our supporting brief.

If we adopt the Commission's interpretation of its own order, as the court below did on the first review, then the Commission's administrative function to reverse, modify or otherwise change its order as to the disposition item, upon and after further hearings, was not exhausted until, after the rehearing, it had rendered an opinion and entered an order with respect thereto. The Commission's order of January 21, 1941, which granted a rehearing as to the matter of disposition, did not preclude the possibility that

the $3,500,000 might be classified in another account or that it might be allowed to remain in Account 107, even though bearing the "write-up" label. This would not have violated the Commission's original cost accounting system, unless the mere reclassification of any sum in Account 107 is tantamount to an automatic write-off, without regard to asset values, in violation of the petitioners' constitutional rights. *American Tel. & Tel. Co.* v. *U. S., supra.*

> "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis* v. *Wakelee,* 156 U. S. 680, 689.

See also: *Michels* v. *Olmsted,* 157 U. S. 198, 201; *United States* v. *Chicago, Milwaukee R. Co.,* 282 U. S. 311, 342.

Furthermore, the right of petitioners to have this Court pass upon what patently are important constitutional questions, in spite of the Commission's maneuvering to prevent such a determination, is abundantly clear even if we accept, for purposes of argument, the current contention of the Commission that only the method of disposition was before the lower court upon the second review.

The Commission was fully informed that petitioners contended that no sum placed in Account 107 could be written off Northwestern's fundamental books of account if the value of its assets was sufficient to support its capital structure. That the Commission was abundantly aware of our position is shown by the following statement made in its order of January 21, 1941:

> "That this grant of rehearing shall not be construed as acknowledgment by the Commission that the character of evidence set out in the application for a rehearing is considered relevant and material to the issue at rehearing" (R. 113).

At the time such order was entered, it thus was apparent that the Commission intended to allow the offer of testimony as to the value of Northwestern's property for the express purpose of raising the constitutional issue.

There certainly can be no question but that the Commission's present repudiation of its clear and definitive interpretation of its original order, coupled with the Circuit Court's disregard both of that interpretation and of its own adoption of that interpretation on the first review, denies the petitioners judicial review of a vital constitutional question and therefore violates the due process clause. And in all events, any consideration of a method or plan which requires the writing-off of amounts fully supported by existing asset values inherently raises the question of deprivation of property without due process.

II.

This case does not deal solely with accounting, as the Commission's brief implies. The challenged order goes beyond the scope and function of accounting, and the brief in opposition does not present grounds for denial of our petition for certiorari. The brief fails to disclose reasons why the questions presented, involving a determination for the first time by this Court of conflicts between the asserted authority of the Commission and state law or state regulation, should not be considered. The possible or probable conflicts are many and concern each of the states and involve a large part of the electric industry. The brief

in opposition does not even consider whether the Commission, instead of state authority, controls the fundamental accounts of public utilities, or the Commission's disregard of state laws, or the extent to which the Commission may exclude state authority, regulatory or judicial, or the Commission's unwarranted disregard of the existing surplus of Northwestern or its arbitrary requirement that disposition of the $3,500,000 be made only out of future earnings.

The twice repeated quotation (Commission's brief, pp. 7 and 11) of the statement of counsel for Northwestern that "our only plan of disposition, if you want to call it that, was one of indisposition to do anything about it" is both elliptical and unfair. The statement of counsel which immediately followed that quoted by the Commission's brief was, "In other words, our plan of disposition was a plan of retention, of keeping that there, which is our position now, that that is an asset, that there are assets that we value on the asset side of the balance sheet to match the liabilities, including the three and a half million dollars that is on the other side" (R. 1080). Nor does the refusal of petitioners to suggest any form of disposition other than that of retaining the $3,500,000 in Account 107 make applicable the criticism suggested in *Alabama Power Company* vs. *Federal Power Commission,* 128 F. (2d) 280, since the Alabama case involved a licensee which was under both statutory and contractual obligation to see that its accounts reflected the original cost of its licensed projects. The denial of certiorari in that case therefore involved neither an interpretation of the statute nor any constitutional question.

American Tel. & Tel. Co. v. *U. S., supra,* is likewise not authority for the statement (Commission's brief, p. 9) that the lower court's approval of the mere transfer of the $3,500,000 in question to Account 107 determined the Commission's power to dispose of that amount arbitrarily. On

the contrary, the decision in that case indicates that to treat disposition as an inevitable consequence of reclassification to Account 107 is arbitrary and invalid. The Commission was unable to cite in the court below, and is unable to cite here, a single court decision holding that any portion of the capital accounts of a public utility (as distinguished from a licensee under the Federal Power Act) may be required to be written off or written down where they are fully supported by the value of its assets. Precisely that question was presented to the court below. It was not passed upon, either on the review of the Commission's original order or on the review of the disposition order. The petitioners clearly are entitled to have this question decided.

No argument urged either in the opinion of the court below or in the Commission's brief in opposition to our petition for certiorari has even approximately answered our contention that American Power & Light Company, as the owner of Northwestern's common stock, has suffered a taking of its property without due process. Aside from the fact that the issue of disposition was not before the lower court upon the first review, American was not a party to that proceeding and it cannot be said to have had its day in court with respect to the taking of its property rights. The Commission's brief (p. 12) baldly asserts, without citation of authority and without pertinent reference to the record, that American's purchase of Northwestern's common stock (in an arm's-length transaction involving some 490 holders of such stock; Ex. 88, R. 933-964) at a cost of $5,021,799.33 is "irrelevant in this proceeding." Why and how is that fact irrelevant? Why was American permitted to become a party to this proceeding if not to defend that investment? Perhaps such an investment is irrelevant in the eyes of a commission which is at once prosecutor and judge and which is intent upon its own

concepts, but it is poignantly and peculiarly relevant to the stockholders of American.

It has not been urged—and, in the light of the record, could not be urged—that Northwestern's common stock is without very real and substantial value when measured by any of the orthodox yardsticks. Furthermore, the lower court's opinion recognizes that the order of the Commission will decrease the market value of such stock, "probably substantially" (R. 1240).

The Commission's order requires American to forego all dividends on Northwestern's common stock until, to use the Commission's own language, there has been obtained "from the holders of the common stock (the holding company) a consideration of $3,500,000 for the stock", *i. e.*, until American has paid for the stock $5,021,799.33, plus $3,500,000, or a total of $8,521,799.33. The effect of the order thus is to destroy or gravely impair the value of American's present investment in such common stock. And yet, in the teeth of this language from the Commission's own opinion, its brief in opposition to our petition for certiorari asserts (p. 12) that its required revamping of Northwestern's capital structure is "in no way analogous to a corporate reorganization"!

In short, the Commission's brief has not answered petitioners' contentions that this case presents important Federal questions which have not been, but should be, settled by this Court, that the decision of the lower court is in conflict with the decisions of this Court in *American Tel. & Tel. Co.* v. *U. S., supra,* and in *Consolidated Rock Products* v. *Du Bois,* 312 U. S. 510, and that the lower court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

It is again respectfully urged that our petition for writ of certiorari should be granted.

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